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Khazanah Jaya Sdn Bhd v Hisco (M) Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1557–08 OF 2019
MOHAMAD ZABIDIN, VAZEER ALAM AND DARRYL GOON JJCA
16 DECEMBER 2021

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Contract — Friendly loan — Claim for repayment of loan — Absence of written agreement — Whether loan an unconditional loan repayable upon demand from date of disbursement — Whether statutory limitation had set in to bar action pursuant to s 6(1)(a) — Whether cause of action could not be grounded on reply to defence — Whether cause of action should be confined to statement of claim — Whether there was abandonment of right to claim — Limitation Act 1953

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The respondent provided a friendly loan to the appellant sometime in December 2007. The loan was fully disbursed between 19 December 2007 and 30 January 2008. The purpose of the loan was to finance a project ('IKBN Project'). No written agreement was executed between the appellant and respondent in respect of the loan. On 16 August 2017, the respondent issued a written demand for repayment of the loan. This was followed by the respondent's statutory notice of demand dated 6 September 2017 issued pursuant to s 465 of the Companies Act 2016 ('statutory notice') demanding repayment of the loan. Thus, the appellant disputed the statutory notice on the basis that the demand for the repayment was time-barred by reason of the Limitation Act 1953. On 6 June 2016, the respondent filed the present writ claiming that the defendants (including the appellant) had failed to repay the loan when demanded. The defendants (including the appellant) in their defence, repeated their defence of statutory limitation pursuant to s 6(1)(a) of the Limitation Act 1953 ('the Act') based on their contention that the loan was repayable upon demand from the date of disbursement. The respondent, on the contrary, in reply to the appellant's defence, contended that the loan was repayable upon completion of the IKBN Project and receipt of the contract proceeds, and since the project was completed only on 28 February 2015, the claim was not barred by the prescribed statutory limitation period. The High Court judge ('HCJ') found the appellant liable to repay the loan on the ground, inter alia, that the loan given by the respondent to the appellant was to be 'repaid upon receipt of the proceeds from the IKBN Project' and as such the claim was not time barred. Dissatisfied, the appellant filed the present appeal on the grounds, inter alia, that: (a) failed to appreciate that the loan given by the respondent to the appellant was an unconditional loan repayable upon demand, and as such statutory limitation had set in to bar the action pursuant to s 6(1)(a) of the Act; (b) erred in law and/or in fact when he failed to

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A appreciate that the respondent's cause of action could not be grounded on the reply to defence and that it must be confined to the statement of claim; and (c) erred in law and/or in fact when failing to appreciate that the respondent had abandoned their claim against the appellant.

B **Held**, dismissing the appeal:

(1) The respondent had sufficiently discharged its evidential burden to establish a prima facie case that the loan of RM2.5m made to the appellant was for the purpose of funding the IKBN project, and that it C was repayable upon demand after completion of the project. The appellant had failed to discharge that evidential burden that there was no such condition for repayment of the loan and that the loan was repayable upon demand simpliciter. Therefore, the HCJ had construed the evidence as a whole before coming to the conclusion that the claim was D not time-barred. Therefore, the HCJ had neither misdirected himself on any point of law nor applied any wrong principles of law to warrant appellate intervention (see paras 30 & 32).

(2) The material facts necessary to establish a cause of action for the E repayment of a friendly loan, ie, a debt due and owing, had been adequately pleaded by the respondent in the statement of claim. The appellant, in its defence, had raised the issue of the loan being unconditional and payable upon demand, and that the claim was time-barred by reason of s 6(1)(a) of the Act. It then became necessary for F the respondent to reply and refute that averment as the respondent's position was that the claim was not time-barred as repayment of the loan was conditional upon completion of the IKBN project and not merely repayable upon demand. The respondent must specifically plead and identify their cause or causes of action against the appellant in the G statement of claim. This the appellant had done. There was no requirement in law for the appellant, to plead in the statement of claim facts in anticipation of the respondent's defence. In the circumstances of the case the respondent's answer to the plea of limitation taken up in the reply to defence was wholly appropriate, as the respondent was merely H responding to matters raised in the defence, as it was entitled to. The respondent was neither seeking to supplement nor to amend any defect in the statement of claim. It was also not a case of adding a new cause of action in the reply to defence (see paras 38 & 45).

(3) The respondent had not abandoned their claim against the appellant. I This was expressly stated by the respondent when queried by the HCJ. Hence, there was no merit in the appellant's contention that in the course of the trial and submissions the respondent had abandoned its claim against the appellant. If that was so, there would not have been any necessity for the HCJ to make a finding as to which of the defendants

were liable for the loan. In the circumstances, there were no merits in the issues raised by the appellant in this appeal that would warrant appellate intervention (see paras 51–52).

[Bahasa Malaysia summary

Responden telah memberikan satu pinjaman friendly loan kepada perayu dalam bulan Disember 2007. Pinjaman tersebut telah diberikan sepenuhnya diantara 19 Disember 2007 dan 30 Januari 2008. Tujuan pinjaman tersebut adalah untuk membiayai satu projek ('projek IKBN'). Tiaa perjanjian bertulis telah dilaksanakan diantara perayu dan responden berkaitan dengan pinjaman tersebut. Pada 16 Ogos 2017, responden telah mengeluarkan satu tuntutan bertulis untuk pembayaran semula pinjaman tersebut. Ini kemudiannya diikuti dengan notis tuntutan berkanun responden bertarikh 6 September 2017 yang dikeluarkan selaras dengan s 465 Akta Syarikat 2016 ('notis berkanun') menuntut pembayaran semula pinjaman tersebut. Oleh demikian, perayu menyangkal notis berkanun atas dasar tuntutan untuk pembayaran dihalang oleh had masa berdasarkan akta had masa 1953. Pada 6 Jun 2016, responden memfailkan writ ini menuntut bahawa defendan-defendan (termasuk perayu gagal untuk membayar pinjaman tersebut apabila dituntut. Defendan (termasuklah perayu) dalam pembelaannya, mengulangi pembelaan had masa statutori selaras dengan s 6(1)(a) Akta Had Masa 1953 ('Akta tersebut') berdasarkan pengataan mereka bahawa pinjaman tersebut hendaklah dibayar atas tuntutan dari tarikh ianya dikeluarkan. Responden sebaliknya, dalam menjawab kepada pembelaan perayu, mengatakan bahawa pinjaman tersebut hendaklah dibayar selepas Projek IKBN dan penerimaan hasil kontrak, dan memandangkan projek tersebut hanya diselesaikan pada 28 Februari 2015, tuntutan tersebut tidak dihalang oleh tempoh had masa yang ditetapkan oleh undang-undang. Hakim Mahkamah Tinggi ('HMT') mendapati bahawa perayu bertanggungan untuk membayar semula pinjaman atas alasan, antara yang lain, bahawa pinjaman tersebut diberikan oleh responden kepada perayu hendaklah dibayar atas penerimaan hasil daripada projek IKBN dan oleh yang demikian tuntutan tersebut tidak dihalang oleh had masa. Tidak berpuas hati, perayu memfailkan rayuan ini atas alasan, antara yang lain, bahawa: (a) gagal untuk mengamati bahawa pinjaman yang diberikan oleh responden kepada perayu merupakan satu pinjaman tidak bersyarat yang perlu dibayar balik apabila dituntut, dan oleh yang demikian, had masa statutori telah pun bermula untuk menghalang tindakan tersebut selaras dengan s 6(1)(a) Akta tersebut; (b) terkhilaf disisi undang-undang dan/atau fakta apabila beliau gagal untuk mengamati bahawa kausa tindakan responden tidak boleh berdasarkan jawapan kepada pembelaan dan ianya mestilah dihadkan kepada penyataan tuntutan; dan (c) terkhilaf disisi undang-undang dan/atau fakta apabila gagal untuk mengamati bahawa responden telah meninggalkan tuntutan mereka terhadap perayu.

Diputuskan, menolak rayuan:

(1) Responden telah melepaskan beban pembuktiannya untuk membuktikan kes prima facie bahawa pinjaman RM2.5 juta dibuat kepada perayu untuk tujuan membiayai projek IKBM, dan bahawa ianya hendaklah dibayar selepas projek tersebut selesai. Perayu gagal untuk melepaskan beban pembuktiannya bahawa tiada sebarang syarat untuk pembayaran semula pinjaman dan bahawa pinjaman tersebut hendaklah dibayar atas tuntutan semata-mata. Oleh yang demikian, HMT telah melihat keterangan secara keseluruhan sebelum tiba kepada kesimpulan bahawa tuntutan tersebut tidak dihalang oleh had masa. Oleh yang demikian, HMT tidak tersalah arah pada mana-mana isu undang-undang mahupun menggunapakai prinsip undang-undang untuk memerlukan campur tangan rayuan (lihat perengan 30 & 32).

(2) Fakta material yang diperlukan untuk membuktikan kausa tindakan untuk pembayaran semula pinjaman friendly loa' iaitu, satu hutang yang perlu dibayar balik, telah diplid secara memadai oleh responden dalam penyataan tuntutan. Perayu, dalam pembelaannya, telah membangkitkan isu bahawa pinjaman tersebut tidak bersyarat dan perlu dibayar semula apabila dituntut, dan bahawa tuntutan tersebut dihalang oleh had masa oleh sebab s 6(1)(a) Akta tersebut. Ianya kemudiannya menjadi perlu untuk responden untuk membalas dan menyangkal pengataan tersebut kerana adalah menjadi kedudukan responden bahawa tuntutan tersebut tidak dihalang oleh had masa kerana pembayaran semula pinjaman adalah berdasarkan syarat penyelesaian projek IKBN dan bukan hanya perlu dibayar apabila dituntut. Responden harus memplid secara spesifik dan mengenalpasti kausa-kausa tindakannya terhadap perayu dalam penyataan tuntutan. Ini telah dilakukan oleh perayu. Tiada keperluan disisi undang-undang untuk perayu, untuk memplid dalam penyataan tuntutan fakta yang menjangka pembelaan responden. Dalam keadaan kes ini, jawapan responden kepada pli had masa yang digunakan dalam jawapan kepada pembelaan adalah sesuai, dan responden hanyalah menjawab kepada perkara yang dibangkitkan dalam pebelaannya, sepertimana yang berada dalam haknya. Responden tidak cuba untuk menambah atau membela apa-apa pembelaan dalam penyataan tuntutan. Ianya juga bukanlah satu kes yang mana menambah kausa tindakan baru dalam jawapan kepada pembelaan (lihat perengan 38 & 45).

(3) Responden tidak meninggalkan tuntutan mereka terhadap perayu. Ini dinyatakan secara nyata oleh responden apabila disoal oleh HMT. Oleh yang demikian tiada merit dalam pengataan perayu bahawa dalam perjalanan perbicaraan dan hujahan bahawa responden telah meninggalkan tuntutannya terhdaap eprayu, dan sekiranya ianya benar, ianya tidaklah menjadi keperluan untuk HMT untuk membuat dapatan samada defendan bertanggungan kepada pinjaman tersebut. Dalam keadaan ini, tiada merit dalam isu yang dibangkitkan oleh perayu dalam

rayuan ini yang memerlukan campur tangan rayuan (lihat perengan 51–52).] A

Cases referred to

Accolade Land Sdn Bhd v Mass Rapid Transit Corporation Sdn Bhd & Ors [2017] MLJU 1868, HC (refd) B
Boot v Boot [1999] GCCR 2097, CA (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd) C
Gerard Jude Timothy Pereira v Kasi a/l KL Palaniappan [2017] 6 MLJ 54; [2017] 1 LNS 889, CA (refd)
International Shipcare Sdn Bhd v The owner of and other persons interested in the ships or vessels MV 'EL HADJAR' [2015] 7 MLJ 753; [2014] AMEJ 1034, HC (refd) D
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
KEP Mohamed Ali v KEP Mohamed Ismail [1981] 2 MLJ 10, FC (refd)
Kam Seng Realty Sdn Bhd v Dato Tai Fatt Yew & Anor [2012] 7 MLJ 825, HC (refd) E
Kong Ming Bank Bhd v Sim Siok Eng [1982] 2 MLJ 205, HC (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Mat bin Lim & Anor v Ho Yut Kam & Anor [1967] 1 MLJ 13 (refd)
Ogilvie v Adams [1981] VR 1041, SC (refd) F
Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd [2004] SGCA 44; [2004] 4 SLR 574, CA (refd)
Saroja @ Nagammai IK Shanmugam v Lakshmanan Perumaal [2008] MLJU 260, HC (refd)
Sim Siok Eng v Kong Ming Bank Bhd [1980] 2 MLJ 21, FC (refd) G
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)
Tan Aik Teck v Tang Soon Chye [2007] 6 MLJ 97; [2007] 5 CLJ 441, CA (refd)
Wilby v Henman (1834) 149 ER 924 (refd)
Williamson v London & North Western Rly Co (1879) 12 ChD 787 (refd) H
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (refd)
Yap Seong Yee v Eureka Property Management Sdn Bhd and another appeal [2018] 6 MLJ 799, CA (refd)

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Legislation referred to

Companies Act 2016 s 465
Limitation Act 1953 s 6(1), (1)(a)
Rules of Court 2012 O 18 rr 3(1), 8(1)

Appeal from: Civil No WA-22NCC-212–06 of 2018 (High Court, Kuala Lumpur)

Jack Yow It Pin (with Neoh Jin Keat) (Rahmat Lim & Partners) for the appellant. Clifford Lee (Clifford Lee, Yen & Yee) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] There is only one main issue in this appeal, and that is whether a friendly loan granted by the respondent to the appellant was an unconditional demand loan, or whether it was a conditional loan repayable upon demand upon completion of a project for which the loan was given.

[2] The determination of this issue was crucial for the appellant's plea of limitation to succeed. If it was a loan simpliciter, repayable upon demand, as contended by the appellant, the respondent's claim would be time-barred. Whereas, if the loan was only payable on demand after completion of the said project, as contended by the respondent, then the claim would still be within the prescribed limitation period.

BACKGROUND FACTS

[3] The respondent had sometime in December 2007, upon the oral request of the second defendant, Tan Boon Keong, agreed to provide a friendly loan of RM2.5m to the appellant. The loan was fully disbursed between 19 December 2007 and 30 January 2008. This was not disputed.

[4] The purpose of the loan was to finance a project known as 'Cadangan membekal, menghantar, memasang, mengujiterima, mentauliah dan menyelenggara peralatan serta pengendalian kursus di Institut Kemahiran Belia Negara (IKBN) Temerloh, Pahang' ('IKBN project').

[5] The IKBN project was awarded by the Kementerian Belia & Sukan ('KBS') to a company called Sinar Bekal (M) Sdn Bhd. The appellant was appointed by Sinar Bekal to administer the IKBN project, where the appellant and Sinar Bekal had a profit share arrangement between them.

[6] The respondent was one of the equipment suppliers for the IKBN project through Sinar Bekal.

[7] No written agreement was executed between the appellant and respondent in respect of the loan. The IKBN project was completed on

28 February 2015 and fully paid by KBS to Sinar Bekal on 14 December 2015. In fact, it was the respondent who had completed the remaining part of the service and maintenance works of the project on behalf of Sinar Bekal vide a deed of assignment dated 2 May 2014 to bring the IKBN project to completion.

[8] On 16 August 2017, the respondent issued a written demand for repayment of the loan ('first written demand'). This was followed by the respondent's solicitor's statutory notice of demand dated 6 September 2017 issued pursuant to s 465 of the Companies Act 2016 ('statutory notice') demanding repayment of the loan. The appellant disputed the statutory notice on the basis that the demand for the repayment was time-barred by reason of the Limitation Act 1953. The appellant contended that the loan was repayable upon demand and as such time started to run from the date of disbursement of the loan at the latest on 30 January 2008, and not from the date of demand. Thus, the appellant argued that the action was time-barred.

[9] The respondent did not act on the statutory notice to file a petition to wind up the appellant, but instead filed a civil action claiming judgment for the loan, which is the subject matter of this appeal.

AT THE HIGH COURT

[10] On 6 June 2016, the respondent filed the present writ claiming that the defendants (including the appellant) had failed to repay the loan when demanded.

[11] The defendants (including the appellant) filed their defence and repeated their defence of statutory limitation pursuant to s 6(1)(a) of the Limitation Act 1953 based on their contention that the loan was repayable upon demand from the date of disbursement.

[12] The respondent filed their reply to defence and contended that the loan was repayable upon completion of the IKBN project and receipt of the contract proceeds, and since the project was completed only on 28 February 2015, the claim was not barred by the prescribed statutory limitation period.

[13] On 8 August 2019, after a full trial, the learned High Court judge found the appellant liable to repay the loan of RM2.5m and judgment was accordingly entered for the respondent.

[14] The learned trial judge found and held that the loan given by the respondent to the appellant was to be 'repaid upon receipt of the proceeds from the IKBN project' and as such the claim was not time-barred.

A THE APPEAL

[15] The appellant being dissatisfied with that decision appealed to this court. The appellant's grounds of appeal set out in the memorandum of appeal may be broadly categorised as:

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(a) the failure of the learned High Court judge to appreciate that the loan given by the respondent to the appellant was an unconditional loan repayable upon demand, and as such statutory limitation would have set in to bar the action pursuant to s 6(1)(a) of the Limitation Act 1953;

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(b) the learned trial judge had erred in law and/or in fact when he failed to appreciate that the respondent's cause of action cannot be grounded on the reply to defence and that it must be confined to the statement of claim;

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(c) the learned High Court judge's decision went against the documentary evidence and admission of the respondent's director that the loan was an unconditional loan repayable upon demand; and

(d) the learned High Court judge had erred in law and/or in fact when failing to appreciate that the respondent had abandoned their claim against the appellant.

E

FIRST ISSUE — WHETHER THE REPAYMENT OF THE LOAN WAS CONDITIONAL

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[16] The appellant contended that the loan granted by the respondent was a loan simpliciter, ie where no conditions were attached for its repayment and was thus repayable anytime from the date of disbursement (see *Kong Ming Bank Bhd v Sim Siok Eng* [1982] 2 MLJ 205; *Sim Siok Eng v Kong Ming Bank Bhd* [1980] 2 MLJ 21; *Boot v Boot* [1999] GCCR 2097; *Ogilvie v Adams* [1981] VR 1041). However, the respondent argued that the loan was only repayable upon demand, after the completion of the IKBN project.

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[17] The learned trial judge made the following findings in this regard:

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(a) the only admissible direct evidence regarding the terms for the repayment of the loan was the oral testimony of the respondent's director, Mr Hoe Min (PW3);

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(b) even though there was no other direct evidence to this effect, the learned judge was of the view that PW3's testimony was corroborated by inferences that could properly be drawn from undisputed primary facts;

(c) the loan was advanced for the purpose of funding the IKBN project, and if the appellant was to have repaid the loan independently of the receipt

of the contract proceeds upon completion of the IKBN project, then there would have been no necessity to borrow the RM2.5m in the first place; and

(d) it is common ground that the loan was intended to fund the IKBN project, which clearly indicated that the appellant did not have access to available funds to itself finance the project, and this leads to an irresistible inference that the loan would be repaid once the contract proceeds from the IKBN project was received.

[18] Having made those findings of fact, the learned trial judge alluded to the evidential burden that was then placed on the appellant's shoulders to disprove the inference. The Court of Appeal in *Gerard Jude Timothy Pereira v Kasi a/l KL Palaniappan* [2017] 6 MLJ 54; [2017] 1 LNS 889 said:

> [50] As rightly pointed out by the learned trial judge himself, in a civil case the plaintiff bears both the legal and evidential burden of proof (see ss 101 and 103 Evidence Act 1950). It is also trite law that legal burden is imposed by law and remains with the plaintiff throughout the trial and never shifts to the defendant. On the other hand, evidential burden moves to and fro between the plaintiff and the defendant depending on the state of the evidence introduced at any one stage of the trial, and unless and until the plaintiff discharges his evidential burden by establishing a prima facie case, there is no burden on the defendant to prove his defence, no matter how weak his defence might be.

[19] Having considered the evidence, the learned trial judge concluded as follows:

> 29. In this case, no evidence was led by the defendants showing any other source of repayment, which could have rebutted the assertion that repayment was to be effected upon receipt of the proceeds of the IKBN project. I therefore found the contention of the plaintiff in this regard was proven, and that the loan in question was not a loan simpliciter, and hence its cause of action did not accrue when the loan was disbursed in January 2008.
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> 30. The evidence in this case showed that the IKBN project was completed on 28 February 2015, which meant that the plaintiff was not out of time when it commenced this action in June 2018.

[20] Hence, the learned trial judge concluded that there was conditionality to the repayment of the loan and that it was to be repaid upon demand *after* completion of the IKBN project. The IKBN project was completed on 28 February 2015. This action was filed on 6 June 2018. Thus, the claim was filed well within the six years limitation period prescribed in s 6(1)(a) of the Limitation Act 1953.

A THE LAW ON APPELLATE INTERVENTION ON FINDINGS OF FACT

[21] The law on appellate intervention in respect findings of facts made by a trial court is well settled. We are reminded of the general rule that an appellate court should be slow to interfere with the findings of fact of a trial court unless the findings were arrived at with no or insufficient judicial appreciation of the evidence before it to render such findings plainly wrong; or the findings were the result of a misdirection by the trial court on the applicable law or there was a wrong application of the law to the facts; or the findings were of a kind which a reasonable court similarly circumstanced, which had properly directed itself and asked the right questions, would not have arrived at (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC); *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 (CA); *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545).

SUBMISSIONS OF THE APPELLANT'S COUNSEL

[22] Learned counsel for the appellant submitted that the learned trial judge had failed to fully appreciate the evidence and that the factual findings went against the documentary evidence and admission of PW3 that the loan was unconditional. We find this contention to be bereft of any merit. PW3 testified as follows in his witness statement:

> Q: What was the term of repayment of the RM2.5m loan?
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> A: When the second defendant approached me to lend him the money of RM2.5m on or about 19 December 2007, he personally informed me that the monies were used to finance the IKBN project and request me not to demand for repayment of the RM2.5m loan when the IKBN project is on-going until and unless full completion of the said project of which the plaintiff also has participated in the supply business as well.
>
> Q: Are you saying that the repayment of RM2.5m loan was conditioned?
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> A: Yes, it is a conditional loan tied with IKBN project. The loan of RM2.5m is pay back on condition that the IKBN project is fully completed and contract money is fully received from KBS.

[23] This evidence was challenged by counsel for the appellant in cross-examination, but PW3 stood firm and remained unshaken. The following part of the cross-examination is relevant:

> DK: And the response to that today, their response to that today is that they don't owe you the 2.5 million anymore, do you agree?

HM: No I don't agree.

DK: I am putting it to you that they have stated that because Khazanah Jaya's position is that the recovery of the loan is now statute-barred agree.

HM: No I don't agree.

DK: I am not asking you whether it is statute-barred or not I am asking you they have always told you that it is statute-barred.

HM: Well he told me that way. I don't agree.

DK: But you do agree he told you that?

HM: Yeah I agree he told me that. But what he said I do not agree.

[24] And in re-examination PW3 stated:

HM: Everything is based on oral, so when BK Tan need to borrow the money we get him the money. So orally he should pay me back when I want the money back but every time when I chase for the money he will say the project is not completed, so project is not completed so the condition is okay, let the project completed, you should pay us back the money. After that also never pay the money that is why we sue them. That is the main reason.

[25] Learned counsel for the appellant submits that there were several oral demands for repayment of the loan in late 2012 and 2013, and this suggests that the repayment was not conditioned upon completion of the IKBN project. Though there were such oral demands, PW3 explained that when those demands were made the appellant had stated that they would repay the loan upon completion of the IKBN project, and the respondent had agreed to that. The respondent then waited until after completion of the IKBN project to demand payment.

[26] In fact, we find that this evidence supports the respondent's contention that the repayment was to be made after completion of the IKBN project. PW3 had stated in his testimony that after completion of the IKBN project in 2015, he had on various occasions orally demanded repayment of the loan and the second defendant had always given some promise of repayment that never materialised. The following excerpt from PW3's witness statement is pertinent to the issue:

Q: Upon completion of the IKBN project, does the plaintiff demand for repayment of the RM2.5m loan from the defendants?

A: Upon completion of the IKBN project in 2015, I had on numerous occasions orally demanded from the second defendant to repay the RM2.5m. But every time the second defendant requested the plaintiff to wait and if the plaintiff really wanted the loan of RM2.5m repaid quickly he can offer the plaintiff some property in Bandar Seri Gemilang at Lahad Datu, Sabah or lands from China projects could be transferred to the plaintiff as repayment of the loan. However, what he promised was never materialised. It is just to induce me to delay pursuing back the loan.

[27] The evidence shows that from 2013 till the completion of the project there were no written demands made, until the issuance of the first written demand on 16 August 2017, and the statutory notice dated 6 September 2017. There was no response from the appellant to the first written demand, however, the appellant disputed the statutory notice.

[28] Learned counsel for the appellant further submits that the first time that respondent raised the issue of the repayment of the loan being conditional on the completion of the IKBN project was in the reply to defence. Counsel submitted that the respondent had an earlier opportunity to raise this namely in an application for a Fortuna injunction made by the appellant to restrain the respondent from filing a winding up petition, but did not do so. Thus, the appellant contended that this issue was an afterthought to save the respondent's claim from statutory time-bar.

[29] We find that there is no substance to this contention. The respondent had issued the first written demand and the statutory notice demanding repayment of the loan. When the appellant disputed the loan on the basis of limitation in the Fortuna injunction application, the respondent made a call not to proceed with winding up but instead chose to have the matter resolved by way of the civil action. This was a prudent course to take as first obtaining a judgment on their claim would be the better option than proceeding with winding up in the face of a disputed debt. Thus, the lack of averment by the respondent during the Fortuna injunction proceedings as to when the loan was to be repaid, was not indicative whether the loan was an unconditional demand loan. The court would have to look at the evidence in its entirety before concluding whether the loan was unconditional as contended by the appellant.

[30] Applying the legal principle governing the burden of proof in a civil claim, we are in agreement with the learned trial judge that based on the facts and circumstances of the present case, the respondent had sufficiently discharged its evidential burden to establish a prima facie case that the loan of RM2.5m made to the appellant was for the purpose of funding the IKBN project, and that it was repayable upon demand *after* completion of the project. Having established that, the evidential burden had shifted to the appellant to lead, by admissible evidence based on their pleaded case, that there were no such condition for repayment of the loan and that the loan was repayable upon demand simpliciter. We further agree with the learned trial judge that the appellant had failed to discharge that evidential burden (see *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 and in *Tan Aik Teck v Tang Soon Chye* [2007] 6 MLJ 97; [2007] 5 CLJ 441).

[31] A similar issue to whether a claim for repayment of a friendly loan was statute-barred by limitation came up for consideration in *Kam Seng Realty Sdn*

Bhd v Dato Tai Fatt Yew & Anor [2012] 7 MLJ 825, where Mohamad Ariff J (as he then was) held:

> [39] *The issue on limitation revolves around the question whether there were agreed terms of repayment*, and if they were no such terms, when the limitation period can be said to run. The minutes of the board of directors meeting referred to earlier, merely refers to 'upon such terms and conditions mutually agreed by both parties thereat'. What these terms and conditions are cannot be gathered from the minutes themselves. Mr Jayakumar, counsel for the first defendant, refers to the common law rule that stipulates where there is no fixed date for repayment of the loan, the period of limitation runs from the earliest time at which an action could be brought' (see the observations of the Federal Court in *Nadefinco Ltd v Kevin Corporation Sdn Bhd* [1978] 2 MLJ 59 and the reference to the English case of *Reeves v Butcher* [1891] 2 QB 509), where Lindley LJ was quoted as stating, 'the right to bring an action may arise on ... this event; but it has always been held that the statute runs from the earliest time at which an action could be brought'. See also the decision of the Singapore High Court in *Tay Ivy v Tay Joyce* [1992] 1 SLR 893 when it is stated that in the case of a loan simpliciter, as a loan repayable from the date of advance, limitation runs from the date of advance. On the evidence, as seen earlier, the date of advance of this particular friendly loan is 14 January 2004. The writ is issued on 24 March 2010. With the limitation period of six years stipulated under s 6(1) of our Limitation Act 1953, if time is taken to run from the date of the advance, the plaintiff's claim will be time-barred. *The issue then turns very much on whether they were in fact terms of repayment agreed between the parties. This again is a matter of evidence.*

[32] Similarly, in the present case, the learned judge had construed the evidence as a whole before coming to the conclusion that the claim was not time-barred. We do not find that there was any lack of appreciation of the evidence by the learned trial judge. We agree with the submissions of learned counsel for the respondent that the learned trial judge had considered the totality of the evidence, the inherent probability of the case, and had drawn the proper inferences from the evidence. There was full and mature consideration of the evidence and there was proper application of the law to the established facts of the case. The learned trial judge had neither misdirected himself on any point of law nor applied any wrong principles of law to warrant appellate intervention.

SECOND ISSUE — THE PLEADINGS POINT

[33] The appellant contends that in the statement of claim, the cause of action is premised upon an unconditional interest free loan repayable upon demand, and that there is no mention in the statement of claim:

(a) of the IKBN project or the purpose of the loan; and

(b) of any conditions such as the loan being repayable upon completion of the IKBN project.

[34] The appellant also stated that the respondent had, in the relief prayed for in para 12 of the statement of claim, amongst others, sought pre-judgment interest to be calculated at the rate of 5%pa from 1 February 2008. Thus, the appellant contended, the reason why the appellant had prayed for interest to be calculated from 1 February 2008 was that the cause of action had accrued on 1 February 2008.

[35] However, in reply to the defence of limitation raised by the appellant in their defence, the appellant had filed a reply to defence wherein it was specifically pleaded that the repayment of the loan was conditional upon demand made after the IKBN project was completed. Learned counsel for the appellant submits that as a matter of pleadings, the respondent's claim was bound to fail as the material facts for the cause of action for breach of contract to repay the loan on demand after completion of the IKBN project had not been specifically pleaded in the statement of claim. This material fact was only stated by the respondent in the reply to defence. Counsel for the appellant argued that the reply to defence cannot supplement or amend the defects of the statement of claim. In this regard, appellant's counsel relied on the decision of the High Court in *Accolade Land Sdn Bhd v Mass Rapid Transit Corporation Sdn Bhd & Ors* [2017] MLJU 1868.

[36] Learned counsel for the respondent on the other hand submitted that the matters stated in the reply to defence were in response to matters raised by the appellant in their defence and that this was entirely permissible under the rules of procedure. Learned counsel for the respondent contended that the fact of the repayment of the loan being conditional upon demand being made after the IKBN project was completed, and the contract proceeds paid by KBS to Sinar Bekal, need be pleaded in the reply to defence as this would be its specific answer to the plea of limitation raised by the appellant in their defence.

[37] Now, it is well settled that pleadings in a civil action include the statement of claim, defence and reply to defence (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196). It is also well established that each party must plead all the material facts on which that party intends to rely on at trial. The respondent's statement of claim had set out the essentials for a claim of a debt due and owing. In *Saroja @ Nagammai IK Shanmugam v Lakshmanan Perumaal* [2008] MLJU 260 the High Court correctly held that:

> The plaintiff's claim against the defendant is of the monies lent to the defendant which she alleged were given as friendly loan on an oral basis. To sustain a cause of action against the defendant all that the plaintiff is required to plead in her pleading is the nature of the loan, the fact that the loan was given, and that it had not been repaid.

[38] Thus, the material facts necessary to establish a cause of action for the repayment of a friendly loan, ie a debt due and owing, had been adequately pleaded by the respondent in the statement of claim. The appellant, in its defence, had raised the issue of the loan being unconditional and payable upon demand, and that the claim was time-barred by reason of s 6(1)(a) of the Limitation Act 1953. It then became necessary for the respondent to reply and refute that averment as the respondent's position was that the claim was not time-barred as repayment of the loan was conditional upon completion of the IKBN project and not merely repayable upon demand .

[39] The respondent may plead as such in the reply to defence pursuant to O 18 r 3(1)of the Rules of Court 2012 which provides:

> 3 Service of reply and defence to counterclaim (O 18 r 3)
>
> (1) A plaintiff on whom a defendant serves a defence shall serve a reply on that defendant if it is needed for compliance with rule 8; and if no reply is served, rule 14(1) will apply.

In the *Malaysian Civil Procedure* (2018) Vol 1 at para 18/3/2 p 229 the commentary on O 18 r 3(1) and as regards the function and purpose of a reply to defence is stated as follows:

> Where reply is necessary — The main purpose of a reply is to enable the plaintiff to raise facts to answer to the defendant's case. Hence, a reply will be necessary if the defendant has raised a matter for the first time in his defence, which matter requires a response from the plaintiff. It is unnecessary to serve a reply if the plaintiff only wishes to traverse the allegations contained in the defence, since if no reply is served, all material facts alleged in the defence are put in issue (r 14(1)). A reply merely 'joining issue' is therefore unnecessary, and costs of the same will be disallowed on taxation under Order 59 r 7.
>
> *On the other hand, it is frequently necessary for the plaintiff to set up some affirmative case of his own in answer to the facts alleged by the defendant. Thus, a reply is necessary if it is required to comply with r 8 (matters which must be specifically pleaded). A plaintiff therefore should reply and specifically plead in his reply any matter which deals with the issues of* performance, release, *limitation,* fraud or any fact showing illegality which he alleges makes the defence available or which might otherwise take the defendant by surprise or raise issues of fact not arising out of the defence (r 8(1); *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; [1992] 2 CLJ 1185 , followed in *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176; [2010] AMEJ 0176). (Emphasis added.)

Thus, when a defendant raises a plea of limitation, it would then be required of the plaintiff, if he so wishes to challenge that plea, to plead in his reply to the defence the material facts that would defeat the defence of limitation. This would be consonant with the provisions O 18 r 8(1) of the Rules of Court 2012:

> 8 Matters which shall be specifically pleaded (O 18 r 8)

(1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

[40] Hence, in *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10, in an action for recovery of money due under a deed of compromise, the defendant raised a plea of limitation. However, the plaintiff countered that contention by pleading in the reply to defence, by way of a general averment, that the law of limitation does not apply, without specifying the material facts relating to a subsequent acknowledgment of the debt, that defeated the limitation plea. Now, as to whether that was permitted by the rules and whether it was sufficient pleading, the Federal Court held:

> In the present case, the material facts relating to the acknowledgement was not pleaded in the statement of claim; it was also not pleaded in the reply apart from stating that the law of limitation does not apply to the present action. That in our opinion is bad pleading. But *it is a matter of indifference to the court whether the plea of acknowledgement is pleaded in the statement of claim or in the reply*. If it is raised in the statement of claim, it would make a reply unnecessary and so reduce costs. A further advantage of pleading an acknowledgement in the statement of claim is that the defendant may thereby be led to refrain from raising the issue of limitation in the defence, thus narrowing the area of discovery and reducing costs (see *Bullen & Leake* (12th Ed) at p 638. *Since the material facts and circumstances were not pleaded in the statement of claim, it should have been pleaded in the reply*). (Emphasis added.)

[41] Therefore, it has been authoritatively settled by the Federal Court, that when limitation is raised by the defendant, the plaintiff's answer to that defence plea should be in the reply to defence. This is important as once a plea of limitation is taken up by the defendant in his pleadings, the plaintiff has the burden of proving that the action was commenced within the limitation period, or why limitation does not apply (see *Wilby v Henman* (1834) 149 ER 924). And in order to do so, the plaintiff must plead the material facts that would establish the fact that the claim is not statute-barred by limitation. Otherwise the plaintiff would be precluded from adducing evidence in that regard.

[42] In so stating we are cognisant of the principle that in a reply to defence, the plaintiff cannot be inconsistent with any previous pleading, nor raise a new ground or claim. In *Mat bin Lim & Anor v Ho Yut Kam & Anor* [1967] 1 MLJ 13, Raja Azlan Shah J (as HRH then was) said:

That being the case, *the reply must not depart from the statement of claim*. In this connection I may as well adopt a passage from the current edition of Bullen & Leake's *Precedents and Pleadings* (11th Ed) at p 694:

> The plaintiff, however, must not set up in his reply a new cause of action which is not raised either on the writ or in the statement of claim; it is provided that 'no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same'. In other words the reply must not contradict or 'depart' from the statement of claim.

See also *International Shipcare Sdn Bhd v The owner of and other persons interested in the ships or vessels MV 'EL HADJAR'* [2015] 7 MLJ 753; [2014] AMEJ 1034; and *Williamson v London & North Western Rly Co* (1879) 12 ChD 787.

[43] The function of a reply in the overall scheme of pleadings in a civil action was considered and well expressed by the Singapore Court of Appeal in *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] SGCA 44; [2004] 4 SLR 574, where the court held:

> It bears remembering that *the function of a reply is to allow the plaintiff to raise facts in answer to the defendant's case*. In particular, *it will be necessary to file a reply if the defendant raises a new issue for the first time in the defence*. As *the function of a reply is limited to answering matters raised in the defence*, it follows that the reply should not be used as an avenue to introduce new causes of action which are not raised in the statement of claim. If a plaintiff wishes to raise an additional and inconsistent claim in the alternative after the statement of claim has been filed, the proper approach should be to apply to amend the statement of claim, rather than slip it in by way of the reply.

[44] Learned counsel for the appellant had referred to the judgment of my learned brother Lee Swee Seng J (as he then was) in *Accolade Land Sdn Bhd v Mass Rapid Transit Corporation Sdn Bhd & Ors* [2017] MLJU 1868 in support of his contention that the respondent had supplemented the statement of claim by the additional facts pleaded in the reply to defence, and that this is not permitted in law. Whilst we agree that as a general rule a party cannot supplement the statement of claim through the reply to defence, we do not find the respondent had in this case, supplemented their case, by merely answering, specifically, the plea of limitation raised by the appellant in the defence. In fact, the pronouncement of my learned brother in *Accolade Land Sdn Bhd v Mass Rapid Transit Corporation Sdn Bhd & Ors* supports the respondent's position. In this regard it would be appropriate to quote the relevant passage from the judgment of Lee Swee Seng J (as he then was):

> [103] It follows from the cardinal principle that a plaintiff is not allowed to supplement its statement of claim by including in its reply, matters that should have been pleaded in the statement of claim. The Singapore High Court case of

Nirumalan K Pillay & Ors v A Balakrishan [1997] 1 SLR 322 stated as follows this principle at p 326, para 10:

> ... Further, because *the function of a reply is to answer matters raised in the defence, its contents must relate to matters raised in the defence*. What is the same thing, *the plaintiffs may not supplement his statement of claim by including in his reply matters which ought to have been included in the statement of claim*. In this respect, a reply is analogous to re-examination of a witness which should be confined to matters touched on in cross-examination. Fresh evidence adding to or re-affirming evidence-in-chief is not permitted in re-examination. (Emphasis added.)

[45] The respondent, as plaintiff in this action, must specifically plead and identify their cause or causes of action against the appellant/defendant in the statement of claim (see *Yap Seong Yee v Eureka Property Management Sdn Bhd and another appeal* [2018] 6 MLJ 799). This the appellant has done. There is no requirement in law for the appellant, as plaintiff, to plead in the statement of claim facts in anticipation of the respondent's defence. Learned counsel for the appellant argues that the respondent ought to have amended the statement of claim to include the fact of the repayment of the loan being conditional after completion of the IKBN project, instead of doing so in the reply to defence. We are of the opinion that in the circumstances of the case the respondent's answer to the plea of limitation taken up in the reply to defence was wholly appropriate, as the respondent was merely responding to matters raised in the defence, as it was entitled to. The respondent was neither seeking to supplement nor to amend any defect in the statement of claim. It was also not a case of adding a new cause of action in the reply to defence. Hence, we find that nothing turns on this issue.

THE CLAIM FOR PRE-JUDGMENT INTEREST FROM 1 FEBRUARY 2008

[46] Now, as for the issue of the plea for pre-judgment interest to be calculated from 1 February 2008, as part of the relief claimed, learned counsel argued that by reason of this relief sought in the statement of claim, the respondent was admitting that the cause of action had accrued on 1 February 2008. We are unable to agree with that contention. The respondent's claim must be seen from the totality of the pleadings. The prayer for relief was only a part of the pleadings. The respondent's claim for pre-judgment interest at 5%pa from 1 February 2008 was merely wishful thinking. When the pleadings are construed as a whole, it is evident that the cause of action accrued from the earliest date where the demand could be made after completion of the IKBN project. Hence, though the respondent had prayed for pre-judgment interest from 1 February 2008, the learned trial judge only awarded pre-judgment interest at the 'rate of 5%pa to be paid from 1 March 2015 until the date of judgment', ie the earliest date on which the demand could be made and when

the cause of action was capable of arising. Thus, it is obvious that the learned trial judge took the respondent's pleaded case as a whole in granting the appropriate relief, including the claim for pre-judgment interest.

THIRD ISSUE — ABANDONMENT OF CLAIM

[47] Learned counsel for the appellant submitted that the learned trial judge had erred in law and in fact when he disregarded the abandonment of the respondent's claim against the appellant.

[48] We do not find any merit in this submission. The claim by the respondent, as plaintiff, against the defendants was in the alternative. In fact, one of the issues for determination by the trial court was 'whether the loan had been granted to the defendants jointly, or whether the loan was only granted to one or other of the defendants'. The learned trial judge had specifically put his mind to this issue and it is reflected in the grounds of judgment:

> 13. The plaintiff's case was expressed in two ways:
>
> (a) first, it was contended that the loan had been granted jointly to Khazanah Jaya and the second defendant; and
>
> (b) second, it was contended that, even if the loan was granted to Khazanah Jaya only, the second defendant was liable to repay the loan on the basis that the benefit of the loan had accrued to him as a shareholder and director of Khazanah Jaya.
>
> ...
>
> 17. Thus, properly understood, the plaintiff's claims against the defendants were in the alternative: the loan was granted to either the first defendant or the second defendant. The basis for the contended liability of the second defendant was the allegation that the loan was given to him personally, and not that the veil of incorporation ought to be lifted to make the second defendant personally liable for a loan that was granted to the first defendant.
>
> 18. Hence, even if the plaintiff's claim succeeded, it could only obtain judgment against one of the defendant, but not both.

[49] The learned trial judge then went on to consider the evidence and found that the loan was in fact granted to the appellant and not the first defendant, and thus His Lordship entered judgment against the appellant only for the sum of RM2.5m with interest and costs.

[50] In fact, during the trial the learned trial judge enquired from learned counsel for the respondent whether the claim against the defendant was in the alternative or if the respondent was abandoning the claim against the appellant, and the same was recorded in the notes of proceedings:

YA: No, no sorry, you just answer my question. Are you abandoning your claim against the First defendant?

CL: No, we are not.

YA: So, it's an alternative claim?

CL: Yes.

YA: But do you accept that they cannot both be liable at the same time?

CL: Yes.

[51] Thus, it is abundantly clear that the respondent had not abandoned their claim against the appellant. This was expressly stated by learned counsel for the respondent when queried by the learned trial judge. Hence, we do not find any merit in the appellant's contention that in the course of the trial and submissions the respondent had abandoned its claim against the appellant. If that was so, there would not have been any necessity for the learned High Court judge to make a finding as to which of the defendants were liable for the loan.

CONCLUSION

[52] In the final analysis, we do not find any merit in the issues raised by the appellant in this appeal that would warrant appellate intervention. Wherefore, we dismissed the appeal with costs to the respondent and affirmed the order of the High Court.

Appeal dismissed.

Reported by K Selvaraju